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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/550,378	09/21/2005	Ethan Vickery	VICE:005US	3385
33425 7590 04/13/2009 FULBRIGHT & JAWORSKI L.L.P. 600 CONGRESS AVE. SUITE 2400 AUSTIN, TX 78701				
EXAMINER				
ARK, DARREN W				
ART UNIT		PAPER NUMBER		
3643				
MAIL DATE		DELIVERY MODE		
04/13/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Interview Summary

Application No.

10/550,378

Applicant(s)

VICKERY, ETHAN

Examiner

Darren W. Ark

Art Unit

3643

All participants (applicant, applicant's representative, PTO personnel):

(1) Darren W. Ark.

(3) _____.

(2) Mark Garrett.

(4) _____.

Date of Interview: 30 March 2009.

Type: a) ☒ Telephonic b) ☐ Video Conference

c) ☐ Personal (copy given to: 1) ☐ applicant 2) ☐ applicant's representative]

Exhibit shown or demonstration conducted: d) ☐ Yes e) ☒ No.

If Yes, brief description: _____.

Claim(s) discussed: 11 and 12.

Identification of prior art discussed: Prior art of record.

Agreement with respect to the claims f) ☐ was reached. g) ☒ was not reached. h) ☐ N/A.

Substance of Interview including description of the general nature of what was agreed to if an agreement was reached, or any other comments: See Continuation Sheet.

(A fuller description, if necessary, and a copy of the amendments which the examiner agreed would render the claims allowable, if available, must be attached. Also, where no copy of the amendments that would render the claims allowable is available, a summary thereof must be attached.)

THE FORMAL WRITTEN REPLY TO THE LAST OFFICE ACTION MUST INCLUDE THE SUBSTANCE OF THE INTERVIEW. (See MPEP Section 713.04). If a reply to the last Office action has already been filed, APPLICANT IS GIVEN A NON-EXTENDABLE PERIOD OF THE LONGER OF ONE MONTH OR THIRTY DAYS FROM THIS INTERVIEW DATE, OR THE MAILING DATE OF THIS INTERVIEW SUMMARY FORM, WHICHEVER IS LATER, TO FILE A STATEMENT OF THE SUBSTANCE OF THE INTERVIEW. See Summary of Record of Interview requirements on reverse side or on attached sheet.

/Darren W. Ark/
Primary Examiner, Art Unit 3643

Summary of Record of Interview Requirements

Manual of Patent Examining Procedure (MPEP), Section 713.04, Substance of Interview Must be Made of Record

A complete written statement as to the substance of any face-to-face, video conference, or telephone interview with regard to an application must be made of record in the application whether or not an agreement with the examiner was reached at the interview.

Title 37 Code of Federal Regulations (CFR) § 1.133 Interviews Paragraph (b)

In every instance where reconsideration is requested in view of an interview with an examiner, a complete written statement of the reasons presented at the interview as warranting favorable action must be filed by the applicant. An interview does not remove the necessity for reply to Office action as specified in §§ 1.111, 1.135. (35 U.S.C. 132)

37 CFR §1.2 Business to be transacted in writing.

All business with the Patent or Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.

The action of the Patent and Trademark Office cannot be based exclusively on the written record in the Office if that record is itself incomplete through the failure to record the substance of interviews.

It is the responsibility of the applicant or the attorney or agent to make the substance of an interview of record in the application file, unless the examiner indicates he or she will do so. It is the examiner's responsibility to see that such a record is made and to correct material inaccuracies which bear directly on the question of patentability.

Examiners must complete an Interview Summary Form for each interview held where a matter of substance has been discussed during the interview by checking the appropriate boxes and filling in the blanks. Discussions regarding only procedural matters, directed solely to restriction requirements for which interview recordation is otherwise provided for in Section 812.01 of the Manual of Patent Examining Procedure, or pointing out typographical errors or unreadable script in Office actions or the like, are excluded from the interview recordation procedures below. Where the substance of an interview is completely recorded in an Examiners Amendment, no separate Interview Summary Record is required.

The Interview Summary Form shall be given an appropriate Paper No., placed in the right hand portion of the file, and listed on the "Contents" section of the file wrapper. In a personal interview, a duplicate of the Form is given to the applicant (or attorney or agent) at the conclusion of the interview. In the case of a telephone or video-conference interview, the copy is mailed to the applicant's correspondence address either with or prior to the next official communication. If additional correspondence from the examiner is not likely before an allowance or if other circumstances dictate, the Form should be mailed promptly after the interview rather than with the next official communication.

The Form provides for recordation of the following information:

- Application Number (Series Code and Serial Number)
- Name of applicant
- Name of examiner
- Date of interview
- Type of interview (telephonic, video-conference, or personal)
- Name of participant(s) (applicant, attorney or agent, examiner, other PTO personnel, etc.)
- An indication whether or not an exhibit was shown or a demonstration conducted
- An identification of the specific prior art discussed
- An indication whether an agreement was reached and if so, a description of the general nature of the agreement (may be by attachment of a copy of amendments or claims agreed as being allowable). Note: Agreement as to allowability is tentative and does not restrict further action by the examiner to the contrary.
- The signature of the examiner who conducted the interview (if Form is not an attachment to a signed Office action)

It is desirable that the examiner orally remind the applicant of his or her obligation to record the substance of the interview of each case. It should be noted, however, that the Interview Summary Form will not normally be considered a complete and proper recordation of the interview unless it includes, or is supplemented by the applicant or the examiner to include, all of the applicable items required below concerning the substance of the interview.

A complete and proper recordation of the substance of any interview should include at least the following applicable items:

- 1) A brief description of the nature of any exhibit shown or any demonstration conducted,
- 2) an identification of the claims discussed,
- 3) an identification of the specific prior art discussed,
- 4) an identification of the principal proposed amendments of a substantive nature discussed, unless these are already described on the Interview Summary Form completed by the Examiner,
- 5) a brief identification of the general thrust of the principal arguments presented to the examiner,
(The identification of arguments need not be lengthy or elaborate. A verbatim or highly detailed description of the arguments is not required. The identification of the arguments is sufficient if the general nature or thrust of the principal arguments made to the examiner can be understood in the context of the application file. Of course, the applicant may desire to emphasize and fully describe those arguments which he or she feels were or might be persuasive to the examiner.)
- 6) a general indication of any other pertinent matters discussed, and
- 7) if appropriate, the general results or outcome of the interview unless already described in the Interview Summary Form completed by the examiner.

Examiners are expected to carefully review the applicant's record of the substance of an interview. If the record is not complete and accurate, the examiner will give the applicant an extendable one month time period to correct the record.

Examiner to Check for Accuracy

If the claims are allowable for other reasons of record, the examiner should send a letter setting forth the examiner's version of the statement attributed to him or her. If the record is complete and accurate, the examiner should place the indication, "Interview Record OK" on the paper recording the substance of the interview along with the date and the examiner's initials.

Continuation of Substance of Interview including description of the general nature of what was agreed to if an agreement was reached, or any other comments: Applicant and Examiner discussed the Non-Final Action mailed on 2/18/2009. Applicant argued that Johnson '768 does not disclose a receptacle and proposed amending claim 11 to recite a bait station comprising a lid and a base. Applicant argued that the obviousness rejection of claims 11 and 12 over Crossen '283 and also Crossen in view of Li '930 and stated that Crossen is silent on how weight 120 is formed and that nothing in Crossen establishes that weight 120 would necessarily have been formed outer ring first/central section second, as is required to establish the existence of the claimed "placing a pre-formed weighted material in the receptacle". Applicant argued his position in that it is not appropriate to construe weight 120 (and its central section 123) as satisfying "placing a pre-formed weighted material in the receptacle". Applicant also argued that Crossen in view of Li '930 and Bartlett '814 or Faucillon '973 is deficient since the concrete that goes into the receptacles of Bartlett and Faucillon is poured into them, thus the concrete is placed in the receptacle in an unformed state (wet), not a pre-formed state as claimed. Examiner expressed concern about relying on solely the manner in which the weight is formed as the basis for patentability since the Examiner believes it would have been obvious to one of ordinary skill in the art to either choose a pre-made weight configuration or a system wherein a container is filled with ballast material, such as those found in portable basketball goals which can receive water or sand, to achieve the desired level of weighting. Examiner directed applicant's attention to Li 6,446,930 which discloses a base receiving a pre-constructed weight (26). Applicant argued that Li does not disclose a receptacle and instead discloses a cover to which a weight is attached and that the cover is open to the ground. Applicant also argued that water and sand are not-preformed materials, and basketball goals require so much weight to hold them down that one would not contemplate/consider using pre-formed weighted material in place of sand/water, that would simply be too much weight to deal with in solid form. Examiner stated that Li 6,637,717 discloses a base (20) with pre-formed weighting material (23 filled with sand or stone) which is subsequently placed in the base; GB 2249249 to Graves which discloses a weight element (16) rigidly secured or bonded within the base (15), wherein the weight (16) must be formed before it can be bonded or secured to base (15); and that McClellan 7,213,869 which discloses preformed weights (60, 80, 140, or 186) to be placed within a base (10). Examiner stated that McClellan clearly illustrates the concept of preformed weights placed in a base. Applicant and Examiner agreed that McClellan '869 filed on April 8, 2005 does not constitute prior art since the present application was filed on March 20, 2004. Applicant argued that there is no reason to combine anything with Crossen and that there is no recognition in Crossen that the weight should be varied to the application, or that there is anything wrong with the weight-to-bait station connection and that moreover, Crossen effectively teaches away from changing his weight because he regards the weight as his invention. Applicant stated that for example, in the Field of the Invention, Crossen states that the present invention relates to "specially configured weights for securing rodent bait stations." Applicant stated that in the Summary, Crossen states that the invention is the weight: "The invention is a tough, durable rodent bait station weight to anchor a bait station firmly in place" and in that same paragraph, Crossen discusses the specifics of the weight itself. Applicant stated that later in the specification, Crossen explains that the weight 120 has a heavier central section 123 that serves as the portion of the weight to which the bait station is anchored. Applicant stated that Crossen states, "The solid section 123 centralizes the weight distribution of the weight 120 which vastly improves the anchoring characteristics of the weight 120." Applicant argued that thus, changing the weighting system of Crossen is not like changing something irrelevant. Examiner argued his position is still strongly held that to vary a weight placed within a bait station would have been obvious to one of ordinary skill in the art so as to maintain the bait station in a single location due to varying factors such as wind or inclination of terrain (steepness of a hill for instance). Examiner stated that varying the weight could be dependent upon volume of material or density of material. Examiner stated that Jalbert 3,708,905 discloses ballast boxes (100) can be filled with rock or other suitable ballast which infers that whatever weight necessary to weight the trap will be placed therein; Ball 3,471,114 discloses the use of either sand or water as ballast, both of which have different densities and thus would provide different weight amounts; Harrison 5,131,184 discloses a trap with a weight (28) that may vary between 25-35 weight range; and Jalbert 3,821,861 discloses slab weights (44) which can be interchanged to provide the correct weight required for the waters being worked (see col. 3, lines 58-60). Examiner stated that the patentable features of the present method involve the specific details pertaining to the grooves and protrusions and the manner in which the receptacle and bait station are joined together as stated previously. Applicant argued the motivations suggested -- varying factors such as wind and inclination of terrain -- have shortcomings. Applicant argued that first, Crossen specifically addresses wind, and notes that his weight is sufficient: "The rodent bait station weight of the present invention prevents the accidental tipping over a bait station, for example, **by the wind** and the rodent bait station is economical to manufacture." Col. 4, lines 1-4 (emphasis added). Applicant argued that as the Board has held, a problem that a primary reference has "already" solved is "not" one that can support a finding of obviousness. See Ex parte Rinkevich, Appeal No. 2007-1317, slip op. at 8-9 (BPAI May 29, 2007) (noting that "the problem proffered by the Examiner is already solved" by the primary reference, and explaining that "a person of ordinary skill in the art having common sense at the time of the invention would not have reasonably looked at [a secondary reference] to solve a problem already solved by [the primary reference]."). Applicant argued that second, terrain inclination is not an actual issue in the art of weighted bait stations and that weighted bait stations are placed on surfaces that are either flat or nearly flat, so there is no concern of whether the weighted bait station will slide on its own and that if you have evidence of terrain being an issue, we will be glad to address it and provide rebuttal declaratory evidence. Applicant stated that therefore, neither purported

motivation can serve as a rational basis for redesigning Crossen's device and that moreover, Crossen stresses that the his weights are connected at their denser, heavier portion (101 or 123) to the bait station. Applicant stated that Crossen explains that doing this "ensures a strong and sturdy mechanical bond with the bait station" (col. 3, lines 6-8) and "vastly improves the anchoring characteristics of the weight 120." (Col. 3, lines 53-55). Applicant argued that changing Crossen so that the bait station is connected to a "receptacle" in which a weight resides -- and eliminating the important connection between the dense/heavy part of his specialized weight and the bait station -- would contravene Crossen's intended purpose. Applicant argued that Jalbert I (3,708,905) is not properly combinable with Crossen for the reasons above and that in addition, the ballast boxes 100 in Jalbert I do not have protrusions that extend up through holes in the bottom of Jalbert I's trap and that rather, they are attached with angle members 116 to plastic strips 36 secured to the lower side of the bottom frame of the trap and that the bolts connecting the angled pieces to the plastic strips terminate in the plastic strips, as shown in FIG. 7 and that moreover, Crossen emphasized a weight that is "easy to attach and remove" (col. 2, lines 16-17) and "economical to manufacture" (col. 4, lines 3-4). Jalbert I's ballast boxes -- with the multiple angled pieces and strips and connectors -- are too complex to comport with either of these objectives. Applicant stated that Ball (3,471,114) is not properly combinable with Crossen for the reasons above and that Ball has other shortcomings as well such as the weights (sand/water) are not pre-formed, and Ball is specifically designed for liquid given the threaded plug 28 and additionally, the ballast base does not have protrusions that extend through holes in the bottom of the garbage can. Applicant stated that the weights in Jalbert II (3,821,861) are placed in the trap itself, not in a separate receptacle that is secured to the trap. Applicant stated that the weight in Harrison (5,131,184) is not in a receptacle either and that it is bolted to the trap, much like Crossen's, but in an entirely different setting (minnow trap in water). Examiner also directed applicant's attention to Morell et al. 3,343,744 which is a bait box for holding poisoning rodents comprising a box with triangular compartments A which are adapted to be filled with sand, gravel or the like so as to provide the necessary weight to prevent the set-up box from being moved either by wind or by an animal seeking the bait which is placed within compartment B, wherein it can be interpreted that sand and gravel are pre-formed by mother nature. Applicant argued that Morell's compartments are inside the bait station, not secured to them with protrusions that extend up through the bottom of the bait station and in fact, the claimed configuration is the antithesis of Morell's foldable construction and that this is clear from reviewing the first column of Morell's patent and that in short, Morell does not anticipate or render the claims obvious, nor would there be any logical reason to combine it with Crossen. Examiner stated that although it is Morell is not a 102(b) reference, the Examiner is trying to show that it would have been obvious to modify Crossen with Morell or any of the other devices which show the addition of weights to a portion below the receptacle to provide a user adjusted ballast. Applicant argued that Crossen does not disclose a receptacle and that it would not make sense to discard Crossen's weight in favor of an unrelated approach to weighing down Crossen's bait station which Crossen describes as old which would completely change the structure of Crossen's device. Examiner argued that although Crossen's device is sort of like an integral structure, my view is that it would have been obvious to take that integral and non-adjustable weight structure and replace it with a base whose volume may be adjusted according to ballast composition and ballast amount and that in the Examiner's opinion, that is not an unreasonable combination with another reference having a compartment (which may or may not be removable from the bait station, since Crossen already discloses the aspect of the bait station removably mounted to the weight below it) whose contents can be varied by the user. Applicant contends that Crossen stresses attaching his weight to the bait station at the denser/heavier part of his weight and that such would no longer be possible if the modification you proposed were made and applicant inquired whether such would be of concern to the Examiner. Examiner stated that such an issue is not of concern since Examiner is not interpreting Crossen with respect to the limitation in the applicant's claims that works against such teaching nor is such a teaching counter to this feature present in the application. Applicant argued that the law does not consider obvious that which would render a device unsuitable for its intended purpose, and the law requires consideration of the purpose/function of the prior art structure being modified. Applicant stated that for example, in *Ex parte Fabrot*, Appeal No. 2008-4799 (BPAI Feb. 24, 2009), a recent Board decision to address this type of issue, the Board reversed an obviousness rejection because replacing the primary reference's lotion with a secondary reference's gel "would eliminate a critical function" of the primary reference's product and that in other words, the Board scrutinized the function of the element of the primary reference the Examiner sought to replace, just as the function of Crossen's weight must be scrutinized and that here, again, it would not be obvious to replace Crossen's weight -- the actual invention, as Crossen saw it -- with something that could not perform the same function Crossen set forth (attachment to the heavier part of the weight itself). Examiner contended that the issue at hand is not the particular distribution of ballast material, rather would it have been obvious to substitute a non-alterable weight system for a weight system with a receptacle having an open volume for receiving a variable amount and kind of ballast and that in the Examiner's opinion, it is obvious to do so. Examiner stated the reason he feels strongly about this is also reinforced by the fact that the Patent Classification has a class 248 subclass 910 titled "Weighted Base" defined as "...structure which comprises a base having means for increasing the weight thereof, the means being either an additional means associated with the base or a particular material from which the base is made and that this in connection with the other patents related to traps and bait stations which can receive differing amounts and types of ballasts reinforces my thinking with respect to limitation in the claims that is in question. Examiner proposed amending claim 11 to include the limitations of claim 12 and also a "step of placing bait in the plastic bait station" along with further amending claim 11 to more particularly claim the manner in which the weight 2400 has a pair of parallel grooves on opposing sides thereof which receive a pair of parallel protrusions 2300 on opposing sides within the receptacle, and then finally further reciting the structure in Fig. 3 of bolt 3010, washers 3020

and 3030, and nut 3040 to secure the receptacle to the bait station. Applicant argued that such a proposed amendment is not acceptable given applicant's arguments that have been presented.